conclusion derives from the fact that a station group with 100 percent reach still would have a national audience share (or channel capacity share) well less than an MSO with 37 percent coverage.

32. Of course, this finding is not the only basis for concluding that the broadcast television national multiple ownership cap should be eliminated. Economic and policy analyses—including those conducted by the Commission and its staff—have repeatedly found that the national multiple ownership rule does not serve the public interest.[30] As I have summarized elsewhere, the available data and economic analyses support the conclusions that:[31]

- Relaxation of the reach limit does not threaten competition and indeed can be expected to strengthen broadcast television networks as competitors.
- Diversity is relevant at the local level and is unaffected by the national cap.
- The cap is an expensive and ineffective means of promoting minority ownership.
- There is no evidence that a group owner whose stations collectively have broad national coverage is less committed to localism than is a group or individual station owner whose stations have more limited coverage.

33. The available data and economic analysis also support the conclusion that the national multiple ownership rule imposes social costs:

- The cap limits the realization of economies of scale and scope.
- The cap blocks expansion of particularly well-run station groups.

---

30 For a brief history of the Commission's treatment of the rule and a public interest analysis of the rule's effects, see *Katz White Paper* at 52-82.

31 *Ibid.*

- The cap limits the abilities of networks to coordinate with stations, and thus it reduces the incentives and abilities of networks to compete for programming and promote it.

By creating these artificial costs, the broadcast television national ownership cap reduces incentives to invest in non-subscription broadcast television. The public interest would best be served by immediate elimination of the national multiple ownership cap.

EXHIBIT A. CURRICULUM VITAE OF MICHAEL L. KATZ

EMPLOYMENT

July 1987 to present

Arnold Professor of Business Administration
Director, Center for Telecommunications and Digital Convergence
University of California at Berkeley

Joint appointment in the Economics Department and School of Business. Initial appointment as an associate professor July 1987. Promoted to full professor July 1989. Granted an endowed chair July 1995. Research on competitive strategy in systems markets, strategic standard setting, public policy in networks markets, telecommunications pricing and policy, strategic alliances, and cooperative research and development. Chaired Strategic Planning Committee, Policy and Planning Committee, Affirmative Action Committee, and the Economic Analysis and Policy Group. Teach MBA courses in business strategy and microeconomics, and doctoral courses in accounting and microeconomics. Author of economics textbook.

January 1994 to January 1996

Chief Economist
Federal Communications Commission

Responsible for integrating economic analysis into all aspects of Commission policy making. Reported directly to the Chairman of the Commission. Formulated and implemented regulatory policies for all industries under Commission jurisdiction, including cable and broadcast television, and local, long distance, and wireless telephony. Managed teams of lawyers and economists to design regulatory policies and procedures. Significantly strengthened Commission's ability to gather industry data and conduct empirical studies. Extensive public speaking to specialist and general audiences in the United States and abroad.

July 1981 to June 1987

Assistant Professor of Economics
Princeton University

Research on sophisticated pricing, standards development, cooperative R&D, and intellectual property licensing. Served as Assistant Director of Graduate Studies. Taught courses in microeconomics, industrial organization, and antitrust and regulation to undergraduate and doctoral students.

EDUCATION

D.Phil. 1982
Oxford University
Doctorate in Economics. Thesis on market segmentation and sophisticated pricing strategies.

A.B. ***summa cum laude*** **1978**
Harvard University
As an undergraduate, completed all courses and general examinations for doctorate in economics.

AWARDS AND HONORS

Chairman's Special Achievement Award, Federal Communications Commission, 1996.
The Earl F. Cheit Outstanding Teaching Award, Berkeley, 1992-1993 and 1988-1989.
Honorable Mention, 1996-1997.
Alfred P. Sloan Research Fellow, 1985-1988.
National Science Foundation Graduate Fellow, 1978-1981.
John H. Williams Prize (awarded to the Harvard College student graduating in Economics with the best overall record), 1978.
National Merit Scholar, 1975-1976.

GRANTS

Berkeley Committee on Research Grant, 1996-1997.
Berkeley Program in Finance Research Grant, 1990.
Researcher, Pew Foundation grant: "Integrating Economics and National Security," 1987-1990.
Principal Investigator, National Science Foundation grants:
"A More Complete View of Incomplete Contracts," joint with Benjamin E. Hermalin, 1991-1993.
"Game-Playing Agents and the Use of Contracts as Precommitments," 1988-1989.
"The Analysis of Intermediate Goods Markets: Self-Supply and Demand Interdependence," 1985-1986.
"Imperfectly Competitive Models of Screening and Product Compatibility," 1983-1984.
"Screening and Imperfect Competition Among Multiproduct Firms," 1982.

PROFESSIONAL ACTIVITY

Member of editorial boards of *California Management Review* and *Journal of Economics and Management Strategy.*

PUBLICATIONS

"Multiplant Monopoly in a Spatial Market," *Bell Journal of Economics* Vol. 11, No. 2 (Autumn 1980).

"Non-uniform Pricing, Output and Welfare Under Monopoly," *Review of Economic Studies* Vol. L, No. 160 (January 1983).

"A General Analysis of the Averch-Johnson Effect," *Economic Letters* Vol. 11, No. 3 (1983).

"The Socialization of Commodities," co-authored with L.S. Wilson, *Journal of Public Economics* Vol. 20, No. 3 (April 1983).

"The Case for Freeing AT&T," co-authored with Robert D. Willig, *Regulation* (July/August 1983) and "Reply to Tobin and Wohlstetter," *Regulation* (November/December 1983).

"Plea Bargaining and Social Welfare," co-authored with Gene M. Grossman, *American Economic Review* Vol. 73, No. 4 (September 1983).

"Firm-Specific Differentiation and Competition Among Multiproduct Firms," *Journal of Business* Vol. 57, No. 1, Part 2 (January 1984).

"Nonuniform Pricing with Unobservable Numbers of Purchases," *Review of Economic Studies* Vol. LI (July 1984).

"Price Discrimination and Monopolistic Competition," *Econometrica* Vol. 52, No. 6 (November 1984).

"Tax Analysis in an Oligopoly Model," co-authored with Harvey S. Rosen, *Public Finance Quarterly* Vol. 13, No. 1 (January 1985).

"Network Externalities, Competition, and Compatibility," co-authored with Carl Shapiro, *American Economic Review* Vol. 75, No. 3 (June 1985).

"On the Licensing of Innovations," co-authored with Carl Shapiro, *Rand Journal of Economics* Vol. 16, No. 4 (Winter 1985).

"Consumer Shopping Behavior in the Retail Coffee Market," co-authored with Carl Shapiro, in *Empirical Approaches to Consumer Protection* (1986).

PUBLICATIONS continued

"Technology Adoption in the Presence of Network Externalities," co-authored with Carl Shapiro, *Journal of Political Economy* Vol. 94, No. 4 (August 1986).

"How to License Intangible Property," co-authored with Carl Shapiro, *Quarterly Journal of Economics* Vol. CI (August 1986).

"An Analysis of Cooperative Research and Development," *Rand Journal of Economics* Vol. 17, No. 4 (Winter 1986).

"Product Compatibility Choice in a Market with Technological Progress," co-authored with Carl Shapiro, *Oxford Economic Papers: Special Issue on Industrial Organization* (November 1986).

"The Welfare Effects of Third-Degree Price Discrimination in Intermediate Goods Markets," *American Economic Review* Vol. 77, No. 2 (March 1987).

"R&D Rivalry with Licensing or Imitation," co-authored with Carl Shapiro, *American Economic Review* Vol. 77, No. 3 (June 1987).

"Pricing Publicly Provided Goods and Services," in *The Theory of Taxation for Developing Countries*, D.M. Newbery and N.H. Stern (eds.), Washington, D.C.: World Bank (1987).

"Vertical Contractual Relationships," in *The Handbook of Industrial Organization*, R. Schmalensee and R.D. Willig (eds.), Amsterdam: North Holland Publishing (1989).

"R&D Cooperation and Competition," co-authored with Janusz A. Ordover, *Brookings Papers on Economic Activity: Microeconomics* (1990).

Intermediate Microeconomics, co-authored with Harvey S. Rosen, Burr Ridge, IL: Richard D. Irwin (1st ed. 1991, 2nd ed. 1994, 3rd ed. 1997).

"Game-Playing Agents: Unobservable Contracts as Precommitments," *Rand Journal of Economics* Vol. 22, No. 3 (Autumn 1991).

"Moral Hazard and Verifiability: The Effects of Renegotiation in Agency," co-authored with Benjamin E. Hermalin, *Econometrica* Vol. 59, No. 6 (November 1991).

"Product Introduction with Network Externalities," co-authored with Carl Shapiro, *Journal of Industrial Economics* Vol. XL, No. 1 (March 1992).

PUBLICATIONS continued

"Defense Procurement with Unverifiable Performance," co-authored with Benjamin E. Hermalin, in *Incentives in Procurement Contracting*, J. Leitzel and J. Tirole (eds.), Boulder, Colorado: Westview Press (1993).

"Judicial Modification of Contracts Between Sophisticated Parties: A More Complete View of Incomplete Contracts and Their Breach," co-authored with Benjamin E. Hermalin, *Journal of Law, Economics, & Organization* Vol. 9, No. 2 (1993).

"Systems Competition and Network Effects," co-authored with Carl Shapiro, *Journal of Economic Perspectives* Vol. 8, No. 2 (Spring 1994).

"Joint Ventures as a Means of Assembling Complementary Inputs," *Group Decision and Negotiation* Vol. 4, No. 5 (September 1995). Also printed in *International Joint Ventures: Economic and Organizational Perspectives.*

"Interconnecting Interoperable Systems: The Regulator's Perspective," co-authored with Gregory Rosston and Jeffrey Anspacher, *Information, Infrastructure and Policy*, Vol. 4, No. 4 (1995).

"Interview with an Umpire," in *The Emerging World of Wireless Communications*, Annual Review of the Institute for Information Studies (1996).

"An Analysis of Out-of-Wedlock Childbearing in the United States," co-authored with George Akerlof and Janet Yellen, *Quarterly Journal of Economics*, Vol. 111, No. 2 (May 1996).

"Remarks on the Economic Implications of Convergence" *Industrial and Corporate Change*, Vol. 5, No. 4 (1996).

"Regulation to Promote Competition: A first look at the FCC's implementation of the local competition provisions of the telecommunications act of 1996," co-authored with Gerald W. Brock, *Information Economics and Policy*, Vol. 9, No. 2 (1997).

"Ongoing Reform of U.S. Telecommunications Policy," *European Economic Review*, Vol. 41 (1997).

"Economic Efficiency, Public Policy, and the Pricing of Network Interconnection Under the Telecommunications Act of 1996," in *Interconnection and the Internet: Selected Papers from the 1996 Telecommunications Policy Research Conference*, G. Rosston and D. Waterman (eds.), Mawah, New Jersey: Lawrence Erlbaum Associates, Publishers (1997).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	MM Docket No. 98-35
Review of the Commission's Broadcast	)	
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202	)	
of the Telecommunications Act of 1996	)	

To: The Commission

EMERGENCY PETITION FOR RELIEF AND SUPPLEMENTAL COMMENTS OF FOX TELEVISION STATIONS, INC.

Pursuant to Sections 1.41 and 1.41(a) of the Commission's rules, Fox Television Stations, Inc. ("Fox") hereby submits an Emergency Petition for Relief and Supplemental Comments in connection with the Commission's Notice of Inquiry, FCC 98-37 (released March 13, 1998 "Notice"). Section 202(h) of the Telecommunications Act of 1996 directs the Commission to conduct a review every two years to "determine whether . . . [its] broadcast ownership rules are necessary in the public interest as the result of competition." The Commission was instructed by Congress to "repeal or modify any regulation it determines to be no longer in the public interest." Over three and a half years have elapsed since the 1996 Act became law, and it has now been almost two years since the Commission initiated the review of the national broadcast ownership rules required by Section 202(h). During this period, the changes in the competitive landscape have been nothing short of staggering. Yet the national ownership rule remains on the books.

Both the marketplace and the Commission's regulatory regime have changed in significant ways since the summer of 1998, when interested parties were invited to submit comments. In particular, the Commission's actions relaxing the broadcast duopoly and cable horizontal ownership rules underscore the need for action here. These marketplace and regulatory changes only serve to underscore the bankruptcy of the regulatory restrictions on national station ownership levels and the need for their immediate repeal. The Commission must be close to finishing the review mandated by Congress, since the next biennial review should have already begun. However, Fox files this Emergency Petition and Supplemental Comments to ensure the Commission undertakes the analysis and judgment Congress has directed it to make upon a current record that includes all the compelling reasons for elimination of the national ownership cap.

In the last 20 months, the competition broadcasters face has become increasingly fierce. Moreover, a number of mergers in the telephone, cable, DBS and broadcasting industries have been proposed or consummated that both alter the competitive landscape and underscore the importance of efficiencies and economies of scale given the cost of doing business in the extraordinarily and increasingly competitive new media marketplace. In the broadcast industry, CBS and Viacom have announced a merger that would, without waivers or divestitures, put the combined entity in violation of the Commission's current limits on horizontal ownership. Thus, national cap restrictions are clearly interfering with arrangements deemed by the market to be efficient and necessary to remain competitive.

We make the following points below:

- <u>More than ever, the 1996 Act and basic principles of administrative law require elimination of the national cap.</u> Under Section 202(h) and general principles of administrative law, the Commission is required to determine whether current competitive conditions mandate retention of the thirty-five percent national broadcast ownership limit. Simply stated, the law requires that the Commission demonstrate the presence of a "market failure" which warrants the substantial interference with market forces imposed by the national broadcast ownership limit. There is simply no evidence of market failure warranting a restriction on the number of stations a single entity can own nationwide.

- Ongoing, rapid changes in the marketplace continue to undermine any policy rationale for retention of the national cap. Recent developments in the marketplace have reinforced the arguments made and evidence presented by Fox in its initial comments that limiting television station ownership on the basis of aggregate audience reach impedes diversity and is contrary to the public interest. Economic analysis and empirical evidence demonstrate that broadcasters are subject to substantial and intense competition, while consumers have access to an ever-growing array of video programming outlets and choices.

- Retention of a 35% national audience reach cap is particularly anomalous in light of recent actions by the Commission. The Commission's recent orders relaxing both the broadcast duopoly rule and the cable horizontal ownership rule underscore the absence of any reasoned basis for retaining the national limits on broadcast station ownership. For example, in the cable context, the Commission has now recognized that the number of homes actually served by a cable operator (subscribers) more accurately reflects its market impact than its potential viewership (homes passed). In contrast, a broadcast station's potential audience (total TV households in its market) instead of its actual audience (at best, only one out of every seven homes in its market on average throughout the day) continues to be the yardstick for measuring market share. Thus the rules more stringently limit a broadcaster's reach, even though, a strong broadcaster, on average, can expect to be viewed in only one in seven homes in a market (i.e., a market share of less than 15%), while the average cable operator is viewed in two out of every three homes it reaches and enjoys a market share of more than 80% of multichannel households in a given market.

- Neither economic theory, nor competition policy, nor the Commission's diversity goals provide a justification for retention of the rules. An economic study prepared by Professor Michael L. Katz of the University of California at Berkeley who was formerly Chief Economist of the FCC, submitted today into this record, concludes that "the national ownership rule..is a prime example of a regulation that is no longer justified in today's economic environment."[1/] As Dr. Katz concludes, the national broadcast ownership rules reduce the incentives for investment in free television. They also reduce the ability of the broadcast television industry to compete for popular video programming -- such as the Super Bowl, the Olympics, and first run theatrical features -- against the growing number of outlets for such popular video programming. The result is to lower the economic welfare of viewers and advertisers. Dr. Katz's study reinforces the empirical, economic and policy bases for immediate elimination of these outdated and unnecessary restrictions.

In short, we will demonstrate that the reasons for an immediate resolution of the Commission's review and elimination of the national broadcast ownership cap are even more compelling than they were when the Commission commenced its inquiry. Fox is compelled to request the emergency relief sought herein because recent changes and new developments in both the

[1/] Michael L. Katz, "Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition," September 1999 ("Katz"), submitted by letter of Bruce D. Sokler, Nov. 18, 1999.

marketplace and the Commission's regulatory framework are having a substantial effect on the company's competitive environment and business opportunities. The Commission should act immediately to eliminate the unnecessary and outdated national broadcast ownership restriction.

I. Congress Has Directed The Commission To Repeal the National Broadcast Ownership Rule If, As the Result of Competition, the Rule is No Longer in the Public Interest

Section 202(c) of the Telecommunications Act of 1996 ("1996 Act") directed the Commission to modify its national broadcast ownership rule by immediately increasing the cap to 35 percent from 25 percent.[2/] In section 202(h) of the 1996 Act, Congress further directed the Commission to review the new 35 percent limit, along with all other broadcast rules, every two years to determine whether they are still "necessary in the public interest as the result of competition."[3/] Section 202(h) requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest" as a result of this biennial review process.[4/] Section 202(h) also states that the Commission's review of its broadcast rules must take place as part of its "regulatory reform review under section 11 of the Communications Act."[5/] In direct response to this Congressional mandate, the Commission issued a Broadcast Ownership Notice of Inquiry ("NOI") to ascertain

---

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act") § 202(c) (not codified in Communications Act).

3/ 1996 Act § 202(h).

4/ Id. The Commission properly recognized that the scope of the review ordered in Section 202(h) extends to the national reach limitation rule. In its Notice of Inquiry released on March 13, 1998, the Commission identified this rule as "within the scope of our biennial broadcast ownership review." In the Matter of 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, Notice of Inquiry, FCC 98-37 (released March 13, 1998) ("Broadcast Ownership NOI") at ¶ 8 ("[b]elow we describe each of the rules within the scope of our biennial broadcast ownership review") and ¶¶ 14-16 (describing national television reach limitation rule). The Commission further noted that section 202(h) "directs the Commission, *without limitation*, to review its broadcast rules." Id. at ¶ 11 (emphasis added).

5/ 1996 Act § 202(h).

whether the national audience reach limitation, as well as other broadcast ownership limitations, remain in the public interest.

Section 202(h) not only imposes an ongoing procedural obligation to review the necessity of its broadcast rules, it also establishes the substantive standard by which the Commission is to assess their continuing efficacy. That standard, which is plainly articulated in the text of section 202(h), is whether, as the result of competition, continuation of the rule in its present form is necessary to effectuate the public interest.[6/] If competition has alleviated the need for continued regulation, the Commission must repeal or modify the audience reach limitation.

The standard in Section 202(h) applies the fundamental, underlying principle of the 1996 Act -- that regulation should be eliminated wherever competition can effectively discipline economic behavior[7/] -- to broadcasting. As the Commission has noted, its objective in conducting the biennial regulatory reviews required by statute is to "reduce or eliminate unnecessary or duplicative regulatory requirements as competition supplants the need for such requirements, consistent with section 11 of the Communications Act, as amended, and the Telecommunications Act of 1996."[8/] The same objective applies to the biennial review mandated by section 202(h), which is to be conducted as part of the section 11 review. The section 202(h) standard thus requires the Commission to eliminate broadcast regulations when the record demonstrates that market forces are sufficient to protect the public policy interests the regulations were originally designed to promote. Conversely, the Commission can retain a broadcasting rule only if it finds a market failure, *i.e.,* that market forces are insufficient to

---

6/ See Telecommunications Act of 1996 § 202(h).

7/ The purpose of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework. . . ." S. Conf. Rep. No. 104-230, at 1 (1996).

achieve the articulated regulatory objectives.[9/] As Dr. Katz's analysis discussed in the next section demonstrates, today neither the arguments advanced by the proponents of the rule nor a rigorous analysis of the marketplace provides a basis for this kind of governmental restriction on the broadcast industry.

If the Commission decides to retain the rules without modification, it must fully explain why 35% of total U.S. television households, and not 40%, 50% or 75%, is the "right" number to achieve the stated purposes of the rule. Although Congress selected the current 35% cap, Section 202(h) of the 1996 Act clearly directs the Commission to determine whether competition warrants either a modification or repeal of the restriction. The Commission is therefore required to articulate an "intelligible principle" that supports the 35% limit.[10/]

The Commission's obligation to review the continuing efficacy of the national broadcast ownership rule stems not just from section 202(h), but from the elementary principles of administrative law that require the Commission to modify or repeal its regulations if warranted by changing market conditions. As the Commission noted in its 1984 Order, where it found that a national broadcast ownership rule was unnecessary due to changes in the broadcasting market, "[t]he

---

8/ In the Matter of 1998 Biennial Regulatory Review - Elimination of Part 41 Telegraph and Telephone Franks, CC Docket No. 98-119, Report and Order, 14 FCC Rcd 2379, 2385 at ¶ 15 (1999).

9/ Cf. In the Matter of 47 CFR §73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules, Tentative Decision and Request for Further Comments, 94 FCC 2d 1019, 1055 (1983) (Commission generally "should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public, *i.e.,* does not impose greater costs than the evil it is intended to remedy"). The Commission has recognized that where a rule originally was intended to prevent the abuse of market power, it must ask, "[I]s there meaningful economic competition? If there is, the why doesn't that eliminate the need for regulation?" In the Matter of 1998 Biennial Regulatory Review -- Petition for Section 11 Biennial Review Filed by SBC Communications, Inc., CC Docket No. 98-177, Notice of Proposed Rulemaking, 13 FCC Rcd 22928, 22930 at ¶ 4 (1998).

10/ See American Trucking Ass'n v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

Commission not only has the authority to reexamine long-standing rules as circumstances change, but is virtually required to do so in order to ensure that it continues to regulate in the public interest."[11/] If "time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed the Commission will act in accordance with its statutory obligations."[12/]

The principles of administrative law the Commission must follow are clear and well-known. First, the Commission must determine whether the broadcast audience reach limitation is a reasonable response to a problem the Commission is charged with solving, considering all of the arguments in the record.[13/] Stated another way, "an agency should not continue to regulate unless it can clearly identify the harm it seeks to remedy."[14/] Here, the threshold inquiry is whether, in light of the vast changes that have transformed the broadcasting industry since national ownership limitations were adopted in the 1940s, any problem still exists that may be solved by capping the aggregate audience served by a single station group. In short, the national cap does not remedy any of the various harms the FCC has identified over the years.

The Commission cannot base its decision on the long pedigree of the broadcast ownership limits or the desire to avoid convulsive modifications to the regulatory framework governing broadcasters. Neither of those considerations is sufficient to justify retention of the national broadcast ownership rule unless the Commission articulates how they are "related to the particulars

---

11/ Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 100 FCC 2d 17, 23 (1984), ("Twelve Station Order"), (citing Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979), recon. granted in part, 100 F.C.C. 2d 74 (1985) ("Twelve Station Reconsideration Order").

12/ National Broadcasting Co. v. United States, 318 U.S. 190, 225 (1943).

13/ See Shurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992) (vacating and remanding Commission's financial interest and syndication ("finsyn") rules).

14/ See N.A.A.C.P. v. FCC, 682 F.2d 993, 1001 (D.C. Cir. 1982) (citing Home Box Office Inc. v. FCC, 567 F.2d 9, 40-42 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

of the rule."[15/] In order to maintain a rule on such grounds, the Commission must explain how it determined that the benefits of a "prudent" approach outweigh the evidence of the negative effects of the rule that are revealed in the record.

Similarly, the fact that different interest groups have sharply contrasting views on the necessity of a rule cannot be the justification for its continuation. The Commission must resolve contrasting points of view in the record "in favor of the party with the stronger case"[16/] rather than abdicating its responsibility to engage in reasoned analysis of the merits of each side's views. In other words, the Commission is not entitled to simply split the difference between opposing points of view.

While the Commission is entitled to exercise judgment in reaching its decisions, it must confront and refute substantial arguments in the record that counsel against the Commission's chosen course. Here, for example, should it decide to retain the national broadcast ownership rule, it must address and refute arguments that the limitation actually undermines the goals it is supposed to foster.[17/] In particular, the Commission must refute arguments in the record that the rule has the perverse effect of diminishing diversity and stifling investment in new programming for free, over-the-air television, and causes that investment to move away from free TV without any countervailing benefit. That task is particularly formidable in light of the evidence and analysis marshalled in Dr. Katz's report.

[15/] Shurz, 982 F.2d at 1050. (faulting Commission's for failing to relate the need for prudence to the particulars of a rule that had substantial impact on an industry that "permeates the daily life of this nation and helps shape, for good or ill, our culture and politics").

[16/] Shurz, 982 F.2d at 1050 (concluding that appropriate response by the Commission when confronted with stark and fundamentally opposing positions is to resolve the conflict in favor of the stronger case, not to split the difference).

[17/] See Shurz, 982 F.2d at 1051 (concluding that the Commission failed to address "more than plausible" analysis pressed by commenters contending that the "finsyn" rules actually undermine the stated goals of competition and diversity).

The Commission must also explain departures from its own precedent.[18/] For example, in its 1984 decision to sunset the national ownership rules, the Commission concluded that such restrictions were no longer necessary to promote diversity and might even be hindering diversity in programming. It reached this conclusion on the basis of changes in the market, new evidence that group owners encourage independent expression, and the irrelevance of national, as opposed to local, ownership restrictions to achieving viewpoint diversity.[19/] The Commission must either explain what has occurred in the intervening years to warrant a change in its views, or, if nothing has changed, it must explain why its conclusions were wrong in the first place.[20/]

Moreover, in addressing precedent, the Commission must explain why it has found that changing circumstances warrant relaxation of ownership limitations in analogous contexts, but not here. For example, the Commission recently relaxed its local ownership rules in "recognition of the growth in the number and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership."[21/]

18/ See, e.g., Shurz, 982 F.2d at 1053 (the Commission must explain why it is rejecting its previous decisions) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983)).

19/ Twelve Station Order, 100 FCC 2d at 19; see also infra at notes 46-50. After the release of the Twelve Station Order, Congress enacted a moratorium on its implementation. See Twelve Station Reconsideration Order, 100 FCC 2d at 76. The Commission subsequently eliminated the numerical cap and substituted the 25 percent national reach limit.

20/ See Shurz, 982 F.2d at 1053. The Shurz opinion noted that the Commission had previously issued a tentative decision eliminating the "finsyn" rules. The finsyn decision had rejected the proposition that networks had market power, found that the finsyn rules were preventing efficient risk-sharing, and concluded that the rules should be phased out. See id. The court found that the Commission's subsequent order retaining a revised version of the finsyn rules failed to explain what had happened in the intervening eight years to cause the Commission to change its mind, or if nothing had happened, why the tentative decision was wrong in the first place. Id.

21/ Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221 and 87-8, Report and Order, FCC 99-209, 1999 FCC LEXIS 3817 (released August 6, 1999) at ¶ 1.

Finally, it is insufficient simply to recite without explanation that the national audience reach limitation promotes the socially beneficial goals of diversity and competition. Rather, basic principles of administrative law require the Commission to explain specifically how the rule promotes diversity and protects competition, particularly in light of the substantial evidence in the record to the contrary.[22/] As detailed below, the Commission cannot proffer such an explanation consistent with the standards under Section 202(h) or general administrative law.

II. There Is No Economic Basis or Empirical Evidence to Justify Retention of National Broadcast Ownership Rules

In its initial and reply comments in this proceeding, Fox detailed the extent to which competition and market forces have thoroughly overrun both the original rationale for the national ownership limits imposed upon broadcasters and the purported public interest benefits of those rules.[23/] Recent competitive developments and marketplace changes have reinforced the position that the limits no longer have any valid competitive or public interest rationale. In this section, we summarize these developments and the analysis of their implications for the 35% cap, which are set forth in greater detail in Dr. Katz's study attached as Exhibit A.

Dr. Katz's analysis of today's marketplace leads him to make several conclusions about the necessity for and efficacy of broadcast ownership regulations originally designed to promote competition and diversity. First, he concludes that since broadcasters face much greater competition than ever before, there is no longer any need for a comprehensive set of regulations to protect viewers and advertisers from the exercise of station or network market power. Second, because

---

[22/] Schurz, 982 F.2d at 1055 (noting Commission made no attempt to explain how its restrictions on network financial participation in programming promoted diversity).

[23/] See Joint Comments of Fox Television Stations, Inc., and USA Broadcasting, In the Matter of 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35 (filed July 21, 1998) ("Fox Comments") at 4-15.

stations and networks have alternative outlets for investment and growth if their ability to engage in free over-the-air television is artificially constrained by regulation, rules like the national cap distort investment decisions and drive broadcasters to direct more of their resources away from free television and toward subscription services. Third, because local stations have increased alternatives to affiliating with a given network, there is no need for a comprehensive set of regulations to protect stations from the exercise of market power.

Dr. Katz cites the national ownership restriction as an example of a rule that no longer promotes its original goals, and can no longer be justified in light of these marketplace realities. His study concludes expressly that the national broadcast ownership rule today "has no public interest justification." This conclusion is based upon his central findings:

(1) "there is no evidence that the national TV ownership cap serves any policy goal."

(2) "while the rule has no public interest benefits, the rule raises costs, leads to a less efficient organization of the industry, and therefore reduces program quality and raises the cost of advertising" because it

- "[l]imits the realization of economies of scale and scope associates with common ownership of multiple stations, thus raising costs and reducing the incentives to invest in [free, over-the-air television]"

- "[b]locks the expansion of particularly well-run station groups"; and

- [l]imits the ability of the broadcast networks to own stations, an arrangement which would otherwise improve the coordination between the networks and the stations' that carry their programming."

Dr. Katz concludes that the national broadcast ownership rule "now harms the public interest rather than protects it" and should be eliminated.[24/]

[24/] Katz at iii-iv, 55-56.

A. Broadcasters Face Substantial Competition and Can In No Way Be Deemed to Exercise Market Power Warranting National Ownership Restrictions

Section 202(h) directs the Commission to "determine whether ... the broadcast ownership rules are necessary in the public interest as the result of competition."[25] Based on the record in this proceeding, the Commission can only make one logical determination: that there is no longer any public interest justification for the national ownership rule.

For more than a decade, the economic and empirical support for the outdated and putative oligopolistic assumptions underlying the broadcast ownership limits has been steadily evaporating. The number of broadcast networks and stations has increased, with a commensurate increase in competition for viewers, advertising and programming. Competition from cable operators, satellite distribution systems and other sources of news and entertainment has intensified dramatically, fragmenting the audience, diverting advertising, and intensifying the bidding wars for popular programming. The Internet promises consumers yet another outlet for news, information and entertainment. The trend toward consolidation within and among the principal competitors to broadcasters has also intensified. These changes have altered the competitive landscape in ways that have made existing horizontal ownership restrictions on broadcasters not only unnecessary but counterproductive.

All of these trends have accelerated rapidly since comments and reply comments were filed in this proceeding. For example, recent viewing data reflect the culmination of a decade-long trend of the increased competition faced by broadcasters. As Dr. Katz observes, "the past two decades have witnessed a sharp increase in competition faced by television stations and networks for viewers, for advertisers, and for programming."[26] Cable, satellite, and Internet companies are all competing

---

[25] 1996 Act § 202(h) (emphasis added).
[26] Katz at 11.

furiously -- and successfully -- for viewers and the advertising revenue they generate. Dr. Katz notes that the collective prime time ratings for ABC, NBC, and CBS fell by half, from 75 to 37.5, between the 1952-53 and 1990-91 seasons.[27/] Even if Fox is included, the total ratings for the "big four" in the 1997-98 season were only 35.3, or less than half the ratings three of the four major broadcast networks enjoyed at their peak.[28/]

The most recent viewership data paint an even starker picture for the networks. In the recently completed 1998-99 season, basic cable "recorded its highest-ever primetime and total day viewership levels for a full 52-week season."[29/] Meanwhile, "ABC, CBS, NBC and Fox collectively posted all-time lows for the 52-week period" in terms of primetime viewership.[30/] On a total-day basis, "viewership of the broadcast network affiliates during full season . . . continued to plummet," falling to a 14.1 rating and 45.7 share of audience.[31/] As Dr. Katz observes, "prime time and total-day ratings for basic cable exceeded the corresponding ratings for ABC, CBS, Fox and NBC combined in the first week of August 1999."[32/]

Whether measured by availability, penetration, ratings, or shares, the competitive success of cable and satellite offerings is undeniable. These subscription-based sources of video programming have undermined whatever dominance the networks and their affiliated stations may have enjoyed when most of the existing restrictions on broadcast ownership rules were adopted.[33/] As Dr. Katz

---

[27/] Id. (citing Paul Kagan and Associates, "The Economics of TV Programming and Syndication," 1999, at 21-22).
[28/] See id. at 11.
[29/] See "Basic Cable Viewership for Just-Completed 1998/99 Season Reaches Record Heights," <<www.cabletvadbureau.com/news/092199news.htm>>
[30/] Id.
[31/] Id.
[32/] Katz at 11.
[33/] See id. at 13-20. The number of broadcast networks and stations also has increased. More than 1,200 commercial television stations are currently in operation, compared to only six in 1946. Indeed, there are more broadcast networks today than there were stations in 1946. VHF

explains, not only has cable increased both its absolute and relative share of the audience for video programming, but the number of channels available to each cable subscriber has expanded, fundamentally changing the economics of programming decisions.[34/] With the ability to deliver dozens or even hundreds of channels, cable and satellite providers have fine-tuned programming for specific audience segments. While the practice of "narrowcasting" to small groups of viewers gives many consumers more choice, it challenges the economic foundation of free broadcast television, which historically has been able to sell advertisers access to large numbers of consumers across the spectrum of demographic characteristics and viewing interests.[35/] The Internet, video games, and other entertainment and information media add to the fragmentation of what was once a largely cohesive audience.[36/]

Fragmentation dilutes the value of national advertising time sold by the networks by reducing the size of the free over-the-air television audience, and it also creates new outlets for advertising, diverting funds that otherwise would have been spent on ad-supported television.[37/] Dr. Katz provides extensive documentation of the erosion of the market for advertising on broadcast television. In 1988, for instance, cable television accounted for only six percent of all television advertising, but by 1993 the proportion of advertising on cable had doubled to 12 percent and had increased to 19 percent by 1998.[38/] While the overall level of network advertising revenue remains

---

stations roughly doubled in the 1950s, and with must-carry rules reducing the disadvantages associated with UHF transmissions, the number of UHF stations continues to grow. See Katz at 35-36.

[34/] See Katz at 24.

[35/] Id.

[36/] See id. at 24-26.

[37/] See id. at 26-32 (describing displacement of demand for advertising time and predicting future erosion of advertising revenue as new media mature).

[38/] See id. at 29 (chart based on figures from Paul Kagan Associates, The Kagan Media Index, January 30, 1997, January 29, 1999, and February 18, 1999; and Paul Kagan Associates, Cable TV Advertising, March 31, 1998).

high, the relative share of advertising dollars devoted to broadcast television has steadily decreased and the absolute level of spending on broadcast commercial time is projected to slide in the future.[39/]

Competition also drives up the cost of programming as the networks struggle to keep their mass audience together in the face of the fragmentation caused by cable, the Internet, and satellite distribution services that give viewers hundreds of viewing options. In order to attract large audiences, networks must emphasize premium or event programming such as professional sporting events, recently-released motion pictures, and awards shows.[40/] Blockbuster programming is extremely expensive to produce, and prices have escalated further as the networks have become more reliant on premium content and competitors bid for the limited supply of programming capable of attracting a mass audience. Broadcasters face unique challenges in generating revenue to pay for programming. Unlike cable and satellite providers, who can charge subscription fees in addition to selling ads, broadcasters are wholly dependent on advertising to pay for programming. In the competition for high-quality programming, the dual revenue stream available to subscription-based services is an increasingly important advantage over free over-the-air television.[41/]

In short, the number and variety of alternative programming and distribution sources has expanded rapidly and continues to grow. Strong competition undoubtedly benefits consumers, but it also puts enormous pressure on the broadcast networks to finance exciting programming that can hold a mass audience for advertisers. The degree of competitive pressure -- and the resulting need for ever-larger amounts of revenue -- has undermined the assumptions underlying national broadcast

---

39/ See id. at 31-32 (explaining that advertising by new media, strong economy, and other factors have temporarily sustained demand for broadcast advertising).
40/ See id. at 32-33.
41/ See id. at 34-35 (explaining and illustrating total revenue advantage of cable and DBS over broadcasters).

ownership rules written in an earlier era, when the networks were the only viable source of programming for the vast majority of viewers and advertisers.

Consolidation in the telecommunications and television industries has also accelerated in the last year and a half, changing the degree and nature of competition faced by broadcasters. For example, the nation's largest telecommunications carrier, AT&T, completed its acquisition of the nation's largest cable operator, TCI. Since that merger was consummated, AT&T also has initiated a transaction to acquire MediaOne, thereby enlarging its base of customers for video programming, as well as a wide range of other entertainment offerings and telecommunications services. After losing out in the bidding for MediaOne, Comcast, another one of the nation's largest cable operators, acquired MediaGeneral's cable properties. In addition, Adelphia announced its intention to acquire Century Cable, and Charter Communications has announced a number of acquisitions that are resulting in the consolidation of several previously small cable companies under the same corporate umbrella.[42/]

In the DBS market, the four competitors that existed two years ago (DirecTV, Primestar, EchoStar and USSB) have shrunk to only two (DirecTV and EchoStar). Each of the two remaining DBS operators can potentially reach 100 percent of national television households, far more than any

---

42/ See "Acquisitions Reshape the Media Industry," Advertising Age, Aug. 16, 1999, at S1, ("Acquisition . . .defined Charter Communications, for which at no time in the year was static. Charter acquired Marcus Cable Co. and Falcon Cable, Nos. 59 and 88 last year, accounting for 2,600,000 new cable subs . . . . Early this year, Adelphia Communications Corp. went from 2.3 million cable customers to 5.1 million in a triple buyout of Century Communications and Frontier Vision Partners, Nos. 64 and 94 a year ago . . ."); Howard Fine, "New Owner of Century Cable Reveals Plans," L.A. Bus. J., Mar. 15, 1999 (noting that "for the local cable market, Adelphia's move represents another step toward consolidation"); "Mediators Advert Lockheed Strike," Tulsa World, Mar. 6, 1999, at 2 (noting that Adelphia's purchase of Century Communications is Adelphia's "second cable system purchase in less than a month and comes amid a consolidation in the cable TV industry").

station group owner or cable MSO would ever reach even if all ownership restrictions were repealed.[43/]

These are formidable competitors who will be able to take advantage of their newly expanded reach and economies of scale. In each instance, these acquisitions have been coupled with announcements from the principals underscoring the importance of obtaining size and scale in the dynamic and rapidly changing video programming business, as well as in related markets.[44/] Indeed, these transactions are viewed by many as responsive to, and reflective of, such mergers as SBC/Ameritech/Pacific, Bell Atlantic/NYNEX/GTE and, most recently, MCI/Worldcom/Sprint.[45/]

[43/] See "Analysts Optimistic About Future of DBS and DARS Sectors," Satellite News, Sept. 7, 1999, available at 1999 WL 6684573, ("The seven firms Satellite News polled are bullish on DBS growth, projecting the average number of subscribers to reach 13.4 million in 2000 and 21.6 million by 2008. . .. Other leading reasons for the optimism: Industry consolidation into the DirecTV and Echostar duopoly. . .[and] [w]ider distribution through the Baby Bells"); "DBS Amassing 16.5M Subscribers By 2003," Satellite News, Aug. 16, 1999, available at 1999 WL 6684530 (noting that the Yankee Group predicts "DBS will continue to achieve major inroads in its battle to gain subscribers in the face of intensifying competition from cable TV subscribers," and according to Michael Alpert, a satellite broadcasting consultant who heads Washington-based Alpert & Associates, 'DBS has a tremendous opportunity to leverage the success they have had over the last year and reach the vision of 40 million homes . . .'").

[44/] See, e.g., C. Michael Armstrong, Testimony Before Senate Judiciary Committee, 1999 WL 20010003, July 14, 1999 ("The MediaOne merger will give us some of the scale we need to compete with the larger and more powerful local exchange company monopolies."); Paige Albiniak and Bill McConnell, "Hostetter to FCC: Approve Merger," Broadcasting and Cable, October 4, 1999, at 18 (quoting Amos Hostetter, AT&T Broadband and Internet Services executive, who said that without merger on scale of AT&T-MediaOne, "what little competition [against regional telephone companies] occurs will be isolated and sporadic and will require much longer to develop."); see also Paul Farhi, "Viacom to Buy CBS, Uniting Multimedia Heavyweights," The Washington Post, September 8, 1999 ("The linking of CBS and Viacom is likely to put pressure on other media companies to strike mergers to achieve greater size and diversity").

[45/] See Peter Huber, "Telecom Mergers Ring in a New Era of Competition," The Wall Street Journal, October 6, 1999, at A22 ("Promoting competition intelligently . . . depends on having a coherent . . . plan for competitors as a group. If the old antitrust metrics shouldn't apply to AT&T, TCI, MediaOne, MCI WorldCom, or Sprint -- and they shouldn't -- it's because markets are converging, providers are rebundling, and the wire-line industry as a whole stands on the threshold of real competition, end to end. The faster the industry is allowed to rebundle, the faster competition will penetrate to the residual cores of the old monopolies . . . ").

Irrespective of its root cause, the most immediate consequence of these mergers is to underscore the importance of lowering the unit costs of new investment by spreading it over a larger customer base, and having the flexibility to grow by tapping new revenue streams and new markets. Outdated and unnecessary regulations should not prevent broadcasters from exploiting the same economies, efficiencies and opportunities their competitors now enjoy.

The benefits of consolidation have not been lost on the major players in the traditional broadcast industry. In September, Viacom and CBS announced plans to merge, creating a company with major holdings in broadcast television, cable, movie production and rental, radio, publishing, and billboard advertising, along with a growing presence in Internet content. However, since the Commission's current rules will require either waivers or divestiture of several television stations and UPN, a nascent broadcast network launched in 1995 by Viacom, the parties will be deprived of the full benefit of the synergies and efficiencies that prompted the combination of two highly successful independent companies.[46/]

B. National Ownership Cap Discourages Investment in Free, Over-the-Air Broadcasting

The 35 percent ownership cap ultimately weakens free, over-the-air television by limiting the return networks can realize from their investments. As a result of the competitive pressure and rising programming expenses discussed above, the broadcast networks are essentially unprofitable as stand-

46/ John Schwartz, "Single Network ISO Studio; The One Without a Movie Partner Isn't Standing Still," The Washington Post, September 9, 1999, at E1 (attributing failure of NBC to reach agreement on merger with Time Warner to obstacles created by cable and broadcast ownership limits); Paul Farhi, "Clap If You Love Mega-TV!; Without the Conglomerates, You Can Wave Goodbye to Free, High-Quality Shows," The Washington Post, September 12, 1999, at B1 (larger network and broadcast entities "may be the only way to keep the humbled networks thriving"); "New Viacom-CBS Entity to Have a Global Reach," The Indianapolis Star, September 8, 1999, at A1 (noting CBS-Viacom would violate 35 percent cap absent divestiture of some stations).